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Supreme Court of the United States

OCTOBER TERM, 1953

No..... MISCELLANEOUS

SCOTT PUBLISHING CO., a corporation, and HUGH A. SCOTT and ERMA SCOTT, his wife,

Petitioners,

vs.

WILLIAM J. GAFFNEY,

Respondent.

No.

PETITION FOR CERTIORARI

SUMMARY AND STATEMENT OF MATTERS INVOLVED

The above petitioners are petitioning for the issuance of a Writ of Certiorari to the Supreme Court of the State of Washington. They desire a hearing on this action in the Supreme Court of the United States and request a reversal of the judgment entered by that Court on November 17, 1952. The judgment affirmed the Superior Court of the State of Washington for Franklin County, granting $2,000.00 and costs to the respondent above upon a verdict of a jury following a trial in a libel action.

There is involved in this proceeding and petition for certiorari the right of a newspaper, The Tri City Herald,

operated by the Scott Publishing Co., and formerly edited by the respondent Hugh A. Scott, to comment upon the activities of the Prosecuting Attorney of Franklin County, Washington. The Trial Court in this proceeding refused to permit the respondents to submit to the jury the question as to whether the publication of the editorials constituted fair comment and privileged criticism. The matter involved herein is whether or not that refusal violates the First and Fourteenth Amendments to the Federal Constitution, and results in a State Court deciding a Federal question in a way not in accord with applicable decisions of this Court.

OPINIONS BELOW

The Supreme Court of the State of Washington rendered its opinion from which this appeal is taken, in *Gaffney v. Scott Publishing Co. et al,* 141 Wash. Dec. 181. Petition for rehearing was denied, 141 Wash. Dec. 461. The opinion, with the dissent, is printed as an appendix to this petition and brief. (Appendix page 17).

An earlier opinion of the Court in the same case, passing upon the sufficiency of plaintiff's complaint on demurrer, is found in *Gaffney v. Scott Publishing Co., et al,* 35 Wash. 2d 272, 212 Pac. 2d 817.

JURISDICTION

The order denying petition for re-hearing was entered

November 17, 1952 (Tr. 77). The judgment was entered on the same date in the Supreme Court of the State of Washington (Tr. 78).

It is contended by the petitioners that this Court has jurisdiction to review this cause and to grant petition for certiorari, based upon the following:

28 U.S.C.A. 1257 (3), authorizing writs of certiorari.

28 U.S.C.A. 1651 (a), authorizing issuance of writs.

It is contended that the State Court has applied the law of libel to this case in such manner as to violate the First and Fourteenth Amendments to the Federal Constitution, and the State Court has decided a Federal question not in accord with applicable decisions of this Court.

QUESTIONS PRESENTED

The Trial Court refused to permit the petitioners to submit the defense of fair comment and privileged criticism of a public officer. The principal questions presented are:

(1) Whether petitioners were entitled under the First and the Fourteenth Amendments to the Federal Constitution to have the pleadings present the issue of fair comment and privileged criticism following reasonable investigation, and have the jury pass upon it.

(2) Whether the petitioners were entitled to have

the Trial Court submit to the jury the issue of whether the editorials were fair comment and privileged criticism under the First and Fourteenth Amendments to the Federal Constitution.

(3) There was raised in the Trial Court and the Supreme Court of the State of Washington the question that the freedom of the press guaranteed by the First Amendment and the Fourteenth Amendment to the Federal Constitution entitles the press, including defendant publishing company, to comment fairly upon the acts and conduct of public officials, and by affirming the Trial Court's adverse ruling on this question and by its application of the law of the State of Washington to the facts, pleadings and instructions in this case, the Supreme Court has decided a Federal question in this case in a manner not in accord with the applicable decisions of the Supreme Court of the United States.

SUMMARY OF PROCEEDINGS

On March 8, 1948, William J. Gaffney, respondent herein, then Prosecuting Attorney of Franklin County, Washington, brought action against the defendants, who are petitioners herein, in two separate causes of action on two editorials claimed to be libelous (Tr. 2-5). The exhibits attached to the complaint (Tr. 6-8 and Tr. 9-10) are the editorials. They also appear in the opinion of the Court on the first appeal (Tr. 57-58).

A demurrer was filed to the complaint (Tr. 11-12) and the demurrer was sustained by the Trial Court on November 1, 1948 (Tr. 13-14). The order was entered (Tr. 15) and an appeal was taken (Tr. 16). Thereafter the State Supreme Court on the appeal from the order sustaining the demurrer reversed the Trial Court and returned the action to the Superior Court for further proceedings (Tr. 56-61).

Thereafter the Trial Court overruled the demurrer (Tr. 21) and an answer (Tr. 22-24), an amended answer (Tr. 26-30), and a second amended answer (Tr. 31-36) were filed. The second amended answer is the only one involved here. The second amended answer set up two principal affirmative defenses to each cause of action, the principal defense being set forth in the first affirmative defense in the second amended answer (Tr. 31-32). In that answer the petitioners allege that after a fair and impartial investigation the editorials were written, that they were a true and fair statement and were published by the defendants without malice or ill-feeling, with honest belief in the truth of the statements and that the purpose of the petitioners was to make a fair comment upon the conduct of the respondent with respect to public affairs in which the respondent was then concerned. The respondent moved against the answer (Tr. 37-38).

At the time of trial respondent brought the motion to

strike on for hearing, asking the Court to strike the affirmative defenses in the answer (St. 31-37). The defenses were stricken, and accordingly the petitioners were not permitted to present the defense of fair comment in the pleadings.

The nature of the fair comment made by the editorial is emphasized in the colloquy on the offers of proof (St. 374-378). Later the comment is made by the Court that since the matter is an opinion that it could not be libelous in itself (St. 616-617).

The Court stated during the course of the trial on the motion to take the case from the jury that the Supreme Court in the first opinion held that the articles exceeded fair comment and violated the privilege of fair comment and therefore were libelous (St. 665-666). Thereafter in the instructions to the jury the Court did not permit the petitioners to present the defense of fair comment and privileged criticism although the instructions requested by petitioners (St. 696-698-699), were to assert the defense of fair comment. They were refused by the Court with the following comment:

> "The Court's notation, incorrect statement of the law where publications are found to be libelous per se. The issue is truth or falsity of the publication for the jury to decide." (St. 698).

And again,

"The Court's notation: Fair comment is not an issue in this case—the privilege was determined to have been exceeded and violated as a matter of law. The only issue is truth or falsity." (St. 699).

Thereafter the jury returned a verdict for the petitioners on the first cause of action and for the respondent in the sum of $2,000 on the second cause of action (St. 714-715). Motions were made for judgment N.O.V. and for new trial, which were denied and judgment was entered (Tr. 50). The case was appealed to the Supreme Court of the State of Washington and the opinion was rendered September 25, 1952, affirming the lower Court.

Thereafter petition for rehearing was denied and judgment entered (Tr. 77-78).

REASONS RELIED ON FOR ALLOWANCE OF WRIT

(1) The Supreme Court of the State of Washington was called upon in this cause to apply the principle of freedom of the press expressed in the First and Fourteenth Amendments to the Federal Constitution. The petitioners, the publisher and editor respectively, of a daily paper, are claimed to have libeled the respondent by commenting upon his conduct as a public officer. In the trial the issue as to whether the comment was fair comment made after a reasonable investigation was not submitted to the jury. The Trial Court thus prevented the principal issue from being passed upon and in effect held there was no right

to fair comment. This we contend constituted a Federal question of substance decided in a way not in accord with applicable decisions of this Court.

(2) The applicable laws of the State of Washington have been applied in this cause so as to deprive the petitioners of their right to trial by jury as guaranteed in the Seventh Amendment to the Federal Constitution and therefore the right of free speech and freedom of the press as guaranteed by the First and Fourteenth Amendments to the Federal Constitution are so curtailed as to be a nullity. Petitioners request this cause be reviewed and remanded with direction to submit to the jury the issue as to whether the comment in the editorials was fair comment.

PRAYER

For the reasons hereinabove set forth and discussed in detail in the brief the petitioners respectfully pray that a writ of certiorari issue to the Supreme Court of the State of Washington to the end that its judgment may be reviewed by this Honorable Court and relief granted in the premises.

SCOTT PUBLISHING CO., a corporation, and HUGH A. SCOTT and ERMA SCOTT, his wife,

Petitioners

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Supreme Court of the United States

OCTOBER TERM, 1953

No..... MISCELLANEOUS

SCOTT PUBLISHING CO., a corporation, and HUGH A. SCOTT and ERMA SCOTT, his wife,

Petitioners,

vs.

WILLIAM J. GAFFNEY,

Respondent.

No.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

REPORTED OPINIONS

The Supreme Court of the State of Washington has written two opinions on this case. The last opinion, September 25, 1952, is found in *Gaffney v. Scott Publishing Co., et al.*, 141 Wash. Dec. 181. It is printed in full with the dissenting opiniion, in the appendix to this brief. (Appendix page 17). The former decision of the Court was entitled in the same cause, *Gaffney v. Scott Publishing Co., et al.*, 35 Wash. 2d, 272; 212 Pac. 2d, 817.

1. PETITIONERS ENTITLED TO HAVE PLEADINGS PRESENT ISSUE OF FAIR COMMENT.

The Trial Court has stricken from the pleadings the defense of fair comment. The defense no longer was an issue and the petitioners were frustrated in any attempt to justify the editorials as fair comment made of the respondent as a public officer.

Such handling of editorial comment can have but one effect, that of depriving persons in the position of the petitioners of freedom of the press and the right of free speech as guaranteed by the First and Fourteenth Amendments to the Federal Constitution. The First Amendment provides that Congress shall make no law abridging the freedom of speech or of the press. The Fourteenth Amendment makes the First Amendment applicable to the states.

Breard v. City of Alexandria, La. 341 U. S. 622, 641; 71 S. Ct. 920, 932.

Murdock v. Commonwealth of Pennsylvania, 319 U. S. 105, 108; 63 S. Ct. 870, 872.

Supreme Court of Washington, on the appeal from the order sustaining the demurrer to the complaint, rendered its opinion, stating:

> "The law properly gives to the public press encouragement to voice its criticism of the conduct of public officials; but, in the exercise of such privilege, a publication which imputes to them misconduct in office, want of official integrity or fidelity to public trust, if false, is a violation of that privilege and gives rise to an

action for damages." *Gaffney v. Scott Publishing Co.*, 35 Wash. 2d, 272, 276, 277; 212 Pac. 2d 817.

The Court has in deciding this case on the last appeal deprived the petitioners of the right to so criticize. Even though the facts as alleged may give rise to a cause of action for damages, the action we submit should be tried fairly and the jury be allowed to pass on the question as to whether the criticism of the public official is fair.

Another recent case has emphasized the erroneous application of the law in Washington.

"Appellant's motion to strike the defense of fair comment or privileged criticism was granted and the cause was tried on the sole issue as to the truth, or falsity, of the statements contained in the editorial," *Lynch v. Republic Publishing Co.*, 40 Wash. 2d, 379, 384; 243 P. 2d 636.

Application of local decisions on libel in the State of Washington has resulted in the limitation of freedom of the press. The application of the decisions has led the Court to deprive petitioners of the substantial defense of fair comment where comment is primarily involved. Editorials are mixed statements of fact and opinion. And public officials must expect to undergo a certain amount of scrutiny and criticism.

"Free discussion of the problems of society is a cardinal principle of Americanism—a principle which all are zealous to preserve." *Pennekamp v. State of Florida*, 328 U. S. 331, 346; 66 S. Ct. 1029, 1936. (A contempt

case reviewed on writ of certiorari to the Supreme Court of the State of Florida).

2. PETITIONERS DEPRIVED OF GUARANTEE OF FREEDOM OF THE PRESS AND CASE DECIDED NOT IN ACCORD WITH APPLICABLE DECISIONS OF THIS COURT.

Throughout the trial the petitioners sought to have the Court submit to the jury the defense of fair comment. Instructions were requested of the Court by petitioners but refused. The decision in so doing constituted a limitation on the freedom guaranteed to the press and was a limitation on due process.

This Court has passed upon and has sustained injunctions against newspaper monopoly under the Sherman Anti Trust Act. The freedom of the press in such cases is to be preserved for the public and not limited by monopoly. By analogy the cases expand the principle to prevent the restriction of the press.

Lorain Journal Co. v. United States, 342 U. S. 143, 156; 72 S. Ct. 181, 187.

Statutes of the State of Washington contain references to criminal libel and when it is excused.

R.C.W. 9.58.020. " * * * It is excused when honestly made in belief of its truth and fairness and upon reasonable grounds for such belief, and consists of fair comments upon the conduct of any person in respect of public affairs, made after a fair and impartial investigation."

This statute was rejected by the Court as applying only to criminal cases. We submit it is declaratory of the common law and that the defense is likewise available in such cases as this. To reject it does deprive the petitioners of their right to comment on matters of public concern. A dangerous precedent is established if no opportunity is given to present such defense to the jury in a civil case.

We feel this case has not been decided in accordance with applicable decision of this Court and that a writ of certiorari should issue, and base that claim on the following:

Grosjean v. American Press Co., 297 U. S. 233, 250; 56 S. Ct. 444, 449,
holding a state license statute as violative of the free press guarantee.

Lovell v. City of Griffin, Ga., 303 U. S. 444, 450; 58 S. Ct. 666, 668,
holding on appeal from the Court of Appeals of the State of Georgia that the violation of the right of free speech and free press were violated by an ordinance regulating the distribution of handbills. Federal question was recognized and certiorari issued.

Murdock v. Commonwealth of Pennsylvania, 319 U. S. 105, 63 S. Ct. 870, in which this Court considered an ordinance regulating solicitation and issued a writ to the Superior Court of the Commonwealth of Pennsylvania.

Baumgartner v. United States, 322 U. S. 665, 673; 64 S. Ct. 1240, 1245, dealing with naturalization and the right of free speech.

Pennekamp v. State of Florida, 328 U. S. 331; 346, 347; 66 S. Ct. 1029, 1937, 1038, in which a conviction of con-

tempt was appealed by an editor of the Miami Herald. Certiorari issued to the State Court and the case reversed.

Winters v. People of the State of New York, 333 U. S. 507, 509; 68 S. Ct. 665, 667, an appeal from a State Court conviction for distributing literature.

CONCLUSION

There are various ways of limiting the freedom of the press. One is by a trend of decisions taking away the right to have a jury under instructions pass on the nature of comments made of public officials. Without such freedom improper actions of public officials could go unchallenged The official always has his right to assert before a jury that the comments were unfair and thus due process preserves the rights of all.

In this case we respectfully request that petitioners be granted the writ prayed for and this Honorable Court review the case.

SCOTT PUBLISHING CO., a corporation,
HUGH A SCOTT and ERMA SCOTT,
Petitioners

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APPENDIX

In the Supreme Court of the State of Washington

WILLIAM J. GAFFNEY,

Respondent,

v.

SCOTT PUBLISHING COMPANY, a corporation; HUGH A. SCOTT, and ERMA SCOTT, his wife,

Appellants.

No. 31699
En Banc

Filed
Sept. 25,
1952

This is a civil action for libel. The complaint states two causes of action, each arising out of an editorial published by defendants concerning plaintiff when he was prosecuting attorney of Franklin county. A demurrer to both causes of action was overruled by this court. *Gaffney v. Scott Publishing Co.*, 35 Wn. (2d) 272, 212 P. (2d) 817 (1949). The cause was tried to a jury, and a verdict returned for the defendants on the first cause of action and for the plaintiff on the second. Defendants have appealed from the judgment entered on the verdict against them.

The editorial upon which the second cause of action rests, is set forth in full in our previous opinion under the heading, "Gaffney Hasn't Learned," p. 275. By the law of the case established in that opinion, the editorial is libelous *per se*.

Defendants alleged "fair comment" as an affirmative defense, including allegations of their honest belief in the truth of the publication, their good faith, and lack of malice or intention to harm plaintiff. All these allegations were stricken on motion of the plaintiff. The court ruled that the defense of truth was the only one available to defendants, and adhered to this ruling in instructing the jury. Defendants' assignments of error upon this ruling and upon the instructions given and proposed will be considered together.

The principal defenses to an action upon a publication libelous *per se* are consent, truth, absolute privilege, qualified or conditional privilege, and fair comment or privileged criticism. See 3 Restatement, Torts, 215. There is no consent or occasion of absolute privilege in this case. In the argument on the demurrer before this court, defendants (then respondents) urged in their briefs that the editorials were within the privilege accorded to newspapers when making open comment concerning public officers. Also, upon the face of the complaint, it was apparent that it pertained to a public officer. The question of privilege was raised and reached by the demurrer. *Arnold v. National Union of Marine Cooks and Stewards Ass'n.*, 36 Wn. (2d) 557, 563, 219 P. (2d) 121 (1950). Whether that claim be classified as one of qualified or conditional privilege, or as one of fair comment or privileged criticism, we need

not decide. Nor need we decide whether or not the editorial contains statements of fact or conclusions, in connection with the possible applicability of the defense of fair comment or privileged criticism. However the defense be designated, in the previous decision of this case the court held (p. 276):

> "The law properly gives to the public press encouragement to voice its criticism of the conduct of public officials; but, in the exercise of such privilege, a publication which imputes to them misconduct in office, want of official integrity or fidelity to public trust, if false, is a violation of that privilege and gives rise to an action for damages." (Citing cases and authorities).

This eliminated all issues in the case except that of truth. In other words, the law of the case is that any privilege defendants may have had was abused if the publication was false. The evidence upon this issue was in conflict. It presented a question to be submitted to the jury, under proper instructions. We find no error in the instructions given or in the refusal to give those proposed. The verdict rests upon substantial evidence, and we will not disturb it.

The defendants also assign error (1) upon the exclusion of a certain radio address made by plaintiff shortly after the publication of the editorial; (2) upon the failure of the court to permit cross-examination of plaintiff regarding the trial of one Connell, subsequent to the publication of

the editorial, for the offense described in the editorial; and (3) upon the exclusion of evidence pertaining to a vice raid made in the county soon after the date of the editorial. Defendants contend that these rulings excluded evidence relevant to the issue of the truth of the statements in the editorial.

Regarding (1), admittedly nearly all of the radio address was irrelevant. Assuming, as defendants contend, that a portion of it disclosed plaintiff's attitude of mind, and that his attitude was relevant, he was subjected to cross-examination on any relevant matters in the radio address itself. Plaintiff's answers to these questions and others were, in substance, the same as his radio address. The defendants were not prejudiced, in any event, by this ruling. As to (2), the failure of plaintiff to prosecute this case and his reasons for not doing so were explored in his cross-examination. The action of plaintiff before the publication was the issue raised by the editorial, and not whether Connell was guilty. Regarding (3), the raid was not shown to have been conducted by plaintiff, nor was the conduct of such raids within his duties as prosecuting attorney. This proffered evidence was not relevant. We find no merit in these claims of error.

The basic portion of this decision is, of necessity, upon quite narrow ground. The trial court was bound to follow the established law of the case, and our only inquiry is

whether or not it did so correctly. There may be merit in the contention of counsel, particularly as set forth in the excellent brief and argument of *amici curiae*, that some of the law of libel expressed in our previous decisions should be recanvassed. This subject was considered upon the first assignment of this case and also upon its reassignment after further conference, but we have concluded that we are foreclosed from its determination in this proceeding.

The judgment is affirmed.

OLSON, J.

We concur:

Schwellenbach, C. J.

Mallery, J.

Grady, J.

Donworth, J.

Weaver, J.

HAMLEY, J. (dissenting)—The trial court precluded appellants from presenting to the jury the defense of privileged criticism. On appeal, the majority declines to review the correctness of that ruling. The reason given is that the trial court's action was required by a holding of this court in the first *Gaffney* opinion, which holding became the law of the case. The holding referred to is this:

> "The law properly gives to the public press encouragement to voice its criticism of the conduct of public officials; but, in the exercise of such privilege, a pub-

> lication which imputes to them misconduct in office, want of official integrity or fidelity to public trust, if false, is a violation of that privilege and gives rise to an action for damages. . . ." *Gaffney v. Scott Publishing Co.*, 35 Wn. (2d) 272, 276, 212 P. (2d) 817.

Is this statement the law of the case, or is it *dictum* of no controlling force here? The only question before us on the last appeal was whether the trial court's action in sustaining a demurrer to the complain was correct. Scott Publishing Company there argued that the demurrer was properly sustained because no special damages were alleged and the publication was not libelous *per se*. We rejected that contention. The company further argued that, even if libelous *per se*, the complaint showed on its face that the defense of privileged criticism applied. It was in response to this contention that we announced, in our previous opinion, the rule quoted above.

In my view, the holding in question was unnecessary in disposing of the company's contention. There is no defense of privileged criticism if the publication is motivated by malice. 3 Restatement, Torts, 275, 278, § 606, comment d. As reported in the first *Gaffney* opinion, the complaint alleged malice. This allegation was admitted by the demurrer. Hence the demurrer itself negatived any reliance upon the defense of privileged criticism at that stage of the case. We expressly so held in *Graham v. Star Publishing Co.*, 133 Wash. 387, 391, 233 Pac. 625.

That was all we needed to say in our earlier opinion in disposing of the company's contention. When we went further and purported to lay down a substantive rule regarding the defense of privileged criticism, we were, in my opinion, indulging in *dictum* which could not become the law of the case.

Assuming, however, that the quoted holding was not *dictum,* or that, even if it were, it became the law of the case, it seems to me that such holding is not an answer to the contention which appellants here make.

The trial court apparently construed this portion of our previous opinion as holding that, in applying the defense of privilege criticism, defamatory expressions of opinion concerning public officers are to be divided into two categories—those which are only moderately defamatory and those which are a great deal more defamatory and go so far as to charge misconduct in office, or want of official integrity or fidelity to public trust. Under this construction, the rule, as announced in the first *Gaffney* opinion, would be that moderately defamatory expressions of opinions are subject to the defense of privileged criticism, but that where the expressions are extremely defamatory, the privilege has been "exceeded," and is not available to a defendant.

The trial court is certainly not to be blamed for so

construing the quoted language, especially since the majority now apparently adopt this same construction. In my opinion, however, an analysis of the language in question, made in the light of accepted general principles, will demonstrate that no such meaning was intended.

This conclusion is more readily reached when it is appreciated that any such rule classifying defamatory expressions of opinion into two such groups, for the purpose of applying the defense in question, is not supported by the authorities. There are several earlier decisions of this court, and some independent authorities (cited in the first *Gaffney* opinion) which use language similar to that now under examination. I believe, however, that in each case the language used had a meaning quite different from that which the trial court and the majority now attribute to these words.

That the accepted rule relating to this defense involves no classification of libelous expressions of opinion into degrees of defamation is made clear by 3 Restatement, Torts, 275. § 606, where the defense of privileged criticism is fully set out. It is there indicated that the defense, if otherwise available, is applicable to all "defamatory" expressions. The term "defamatory" is defined as including communications which reflect unfavorably upon one's personal morality or integrity, as well as those which are derogatory in

a lesser degree. 3 Restatement, Torts, 140, § 559, comment b.

Why the quoted holding cannot mean what the trial court and the majority say it does—and what it really means—can best be demonstrated by referring to some general principles of the law of libel applicable in this case.

The defense of privileged criticism is limited to expressions of opinion, and furnishes no immunity if the statement appears as fact. *Burt v. Advertiser Newspaper Co.*, 154 Mass. 238, 28 N. E. 1; *Hubbard v. Allyn*, 200 Mass. 166, 86 N. E. 356; *Eikhoff v. Gilbert*, 124 Mich. 353, 83 N. W. 110; Prosser on Torts 842, § 94; Odgers on Libel and Slander (5th ed.) 196, 197; 3 Restatement, Torts, 280, comment a. Hence, if the libelous matter in this editorial consists entirely of statements of fact, the only defense is truth or the existence of some absolute or conditional privilege other than privileged criticism. 3 Restatement, Torts, 214-275, 293-297, §§ 582-605, 611-612. No other absolute or conditional privilege was here urged.

The question of whether any of the derogatory words in question were expressions of opinion was for the jury. *Nevada State Journal Publishing Co. v. Henderson*, 294 Fed. 60, 62; 3 Restatement, Torts, 309, § 618 (2), comment b. We did not hold otherwise in our previous opinion. It may be observed that the publication in question is an editorial, and that editorials usually contain both statements of fact

and expressions of opinion. It is also to be noted that one of the derogatory statements upon which respondent relies as libelous, which statement comments on the justification for recall proceedings, is expressly labeled as "our opinion."

Though the point seems never to have been directly decided, it may be inferred from the Washington decisions that the defense of privileged criticism is available only if the opinion is based upon a true or privileged statement of fact. See *Miles v. Wasmer, Inc.*, 172 Wash. 466, 20 P. (2d) 847. The rule set out in Restatement of Torts would seem to go further, and permit the defense even though the opinion is based upon false statements of fact, if such purported facts are otherwise known or available to the recipient as a member of the public. 3 Restatement, Torts, 275, § 606 (1) (a) (ii).

In advancing the defense of privileged criticism, it is not necessary to prove that the libelous expressions of opinion (as distinguished from the facts upon which they are based) are true. 3 Restatement, Torts, 275, § 606. Defamatory expressions of *opinions* are not, in fact, susceptible to proof as to their truth or falsity. For example, there is no way in which a jury could determine whether the expression of opinion in this editorial, that respondent should be recalled, is true or false. The policy considerations behind the rule that the truth of defamatory criticism (as distinguished from defamatory statements of fact) is not

an issue, are stated with clarity by Van Vechten Veeder, writing on "Freedom of Public Discussion," 23 Harvard Law Review, 413, 415, 416, 422.

With these principles in mind, we can turn to the quoted holding in our prior decision which is said to warrant the trial court in excluding the defense of privileged criticism. That holding refers to the privilege of criticizing the conduct of public officials, and announces the rule that a publication which imputes to public officials misconduct in office, "if false," is a violation of that privilege.

The use of the words "if false" is very significant. These words indicate that the court was talking about libelous *statements of fact* which impute misconduct, and *statements of fact* upon which libelous expressions of opinion were based. This is true because, as we have seen, statements of fact are subject to a determination as to their truth or falsity, and expressions of opinion are not.

Hence, what the quoted holding really stands for is the rule, consonant with the principles summarized above, that a person who makes a false statement of fact tending to impute misconduct to public officials, or who bases an expression of opinion carrying such an imputation, upon a false statement of fact, enjoys no defense of privileged criticism.

It seems apparent to me that the rule, as so understood, does not preclude the defense of privileged criticism in this case. It merely states the qualifications and limitations regarding that defense which the trial court should have made known to the jury for their consideration in connection with this defense.

The jury should have been told, with respect to this phase of the defense, that there are words in this editorial which impute misconduct in office, or want of official integrity or fidelity to public trust, which words are libelous *per se;* that such, if any, of these words as the jury finds to be express or implied statements of fact are not protected by the defense of privileged criticism, the only defense as to such words being truth; and that as to such words, if any, which the jury finds to be expressions of opinion, the defense of privileged criticism does not apply, if any of the facts upon which the opinion is expressly or impliedly based are false. The other elements of a complete instruction regarding this defense are well-summarized in 3 Restatment, Torts, 275, § 606.

Such instructions would have fully safeguarded respondent's rights. Our previous decision does not, in my opinion, require that respondent be entirely insulated from the defense of privileged criticism. Nor do the general

principles applicable in this state and elsewhere warrant such a result.

HAMLEY, J.

We concur in Judge Hamley's dissent

Hill, J.

Finley, J.